Visi Nusajaya Sdn Bhd v Elite Alliance Engineering Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCC-36–03 OF 2019
ABD MAJID JC
17 JULY 2019

Civil Procedure — Injunction — Fortuna injunction — Defendant obtained adjudication decision — Defendant issued notice under s 466 of the Companies Act 2016 to plaintiff — Plaintiff applied for Fortuna injunction to restrain defendant from proceeding with winding up petition — Whether defendant admitted facts in plaintiff's grounds of application — Whether adjudication decision had been enforced under s 28 of the Construction Industry Payment and Adjudication Act 2012 — Whether adjudication decision binding — Whether fortuna injunction ought to be allowed — Construction Industry Payment and Adjudication Act 2012 ss 5 & 28 — Companies Act 2012 s 466

The defendant was appointed by the plaintiff as a pipe-jacking subcontractor for a project where the defendant had filed the payment claim under s 5 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The defendant had obtained the adjudication decision and subsequently issued a notice under s 466 of the Companies Act 2016. The plaintiff then filed the present application for a fortuna injunction to restrain the defendant from proceeding with the winding up petition. In supporting the plaintiff's application, the following grounds were cited: (a) denial of natural justice; (b) the adjudication decision had not been enforced; (c) non-disclosure of material facts in relation to an oral agreement between them; (d) there was a cross claim against the defendant in relation to a similar job in Malacca where the defendant failed to construct according to the approved designed and a third party had to be appointed to remedy and complete the job; (e) the plaintiff had filed an application to set aside the adjudication decision; and (f) there were ongoing projects and the plaintiff would suffer irreparable damage and the plaintiff was solvent. The defendants contended that: (i) items (a)–(c) above were deposed in the supplementary affidavit and should not concern the judge, the issues would be relevant for setting aside and stay of the adjudication decision; (ii) solvency of the plaintiff was irrelevant; (iii) the adjudication decision was binding unless a stay was granted or set aside; (iv) the adjudication decision need not be enforced for the purposes of s 466 notice; and (v) presumption of being insolvent had been triggered against the plaintiff after the lapse of 21 days.

Held, allowing the application:

(1) The defendant was taken to admit the facts in items (a)–(c) as they were not questions or issues of law which may be rebutted by way of oral submission. They were matters of facts which were relevant to the application and they were before the court. The defendant should at the very least attempt to show that they did not amount to a disputed debt (see para 5).

(2) The adjudication decision had yet to be enforced under s 28 of the CIPAA, as such, the adjudication was not biding more so when the defendant had admitted to the existence of the oral agreement pertaining to the setting-off and the cross-claim (see para 7).

[Bahasa Malaysia summary

Defendan telah dilantik oleh plaintif sebagai sub-kontraktor pembicuan paip untuk satu projek yang mana defendan telah memfailkan tuntutan pembayaran di bawah s 5 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Defendan telah memperoleh keputusan adjudikasi dan kemudiannya mengeluarkan notis di bawah s 466 Akta Syarikat 2016. Plaintif telah kemudiannya memfailkan permohonan ini untuk satu injunksi fortuna untuk menghalang defendan daripada meneruskan dengan petisyen pengulungan. Dalam menyokong permohonan plaintif, alasan-alasan berikut telah dikemukakan: (a) penafian keadilan asasi; (b) keputusan adjudikasi masih belum dikuatkuasakan; (c) kegagalan untuk mendedahkan fakta material berkaitan dengan perjanjian lisan antara mereka; (d) wujud satu tuntutan balas terhadap defendan berkaitan dengan tugasan yang hampir serupa di Melaka yang mana defendan telah gagal untuk membina selaras dengan rekaan yang diluluskan dan satu pihak ketiga perlu dilantik untuk membaiki dan melengkapkan kerja tersebut; (e) plaintif telah memfailkan permohonan untuk mengetepikan keputusan adjudikasi; dan (f) wujud projek yang sedang berjalan dan plaintif akan mengalami kerugian yang tidak boleh dipulihkan dan plaintif dalam keadaan mampu bayar. Defendan menegaskan bahawa: (i) item (a)–(c) di atas yang dideposkan dalam afidavit tambahan tidak harus dihiraukan oleh hakim, isu-isu tersebut akan relevan untuk mengetepikan dan penangguhan keputusan adjudikasi; (ii) kemampuan bayaran plaintif adalah tidak relevan; (iii) keputusan adjudikasi adalah mengikat kecuali satu penangguhan telah diberikan atau diketepikan; (iv) keputusan adjudikasi tidak perlu dikuatkuasakan untuk tujuan notis s 466; dan (v) anggapan tidak mampu bayar telah bermula terhadap plaintif selepas tamatnya 21 hari.

Diputuskan, membenarkan permohonan:

(1) Defendan telah dikatakan mengakui fakta dalam item (a)–(c) memandangkan mereka bukan persoalan atau isu undang-undang yang boleh di sangkal melalui hujahan lisan. Ianya merupakan fakta yang relevan terhadap permohonan dan ianya adalah dihadapan mahkamah. Defendan perlu sekurang-kurangnya cuba untuk menunjukan bahawa

ianya tidak terjumlah kepada hutang yang dicabar (lihat perenggan 5).

(2) Keputusan adjudikasi masih belum dikuatkuasakan di bawah s 28 Akta, oleh itu, adjudikasi tersebut tidak mengikat terutamanya apabila defendan mengakui kewujudan perjanjian lisan berkenaan dengan penolakan dan tuntutan balas (lihat perenggan 7).]

Notes

For cases on Fortuna injunction, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4196–4200.

Cases referred to

Dataran Rentas Sdn Bhd v BMC Constructions Sdn Bhd [2008] 2 MLJ 856; [2007] 2 MLRA 449, CA (refd)

Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd [2014] 11 MLJ 916; [2013] 5 MLRH 299, HC (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 MLRA 48, CA (folld)

Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)

Wong Sai Tack v Chien Hon Keong [2000] 5 MLJ 74; [1999] 3 MLRH 716, HC (refd)

Legislation referred to

Companies Act 2016 ss 218, 218(1)(e), 466
Construction Industry Payment and Adjudication Act 2012 ss 5, 28

Teoh Ting Wei (Gan Partnership) for the appellant.
Kuldeep Kumar (J Kuldeep Kumar) for the respondent.

Abd Majid JC:

[1] The defendant obtained an adjudication decision on 18 December 2018 under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') against the plaintiff for a sum of RM736,242.36. The adjudicator's decision has yet to be registered and enforced. On 18 February 2019 the defendant issued a notice under s 466 of the Companies Act 2016 demanding for payment. In order to restrain the defendant from proceeding with the winding up petition the plaintiff sought a Fortuna injunction and at the same time filed an application to set aside the said adjudication decision. After hearing both parties I issued the said injunction.

[2] The plaintiff, by a letter of award dated 7 March 2017, appointed the

defendant as a pipe-jacking subcontractor for a project known as Pembinaan Rangkaian Paip Pembetungan di Kawasan Upper Kerayong, Selangor (Reka dan Bina). On 27 June 2018 the defendant filed the payment claim under s 5 of the CIPAA for:

(a) variation work yet to be valued and certified, under Progress Claim No 10P, for work done on 12 December 17 and 21 December 17, amounting to RM2,121.06 (including 6% GST);

(b) unpaid certified amounts totaling RM251,527.89 (including 6% GST) under Certificate of Payment No 6, 7 and 8;

(c) failure to include work done, certify and pay Certificate of Payment No 9 amounting to RM440,557.20 (including 6% GST);

(d) *ALTERNATIVELY*, the unpaid certified sum of RM363,283.20 (including 6% GST) in Certificate of Payment No 9;

(e) undervaluation and under-certification of work totaling RM41,387.17 (including 6% GST) for Progress Claims No 1–9;

(f) release of 2.5% retention sum (first moiety) amounting to RM72,882.94 (including 6% GST); and

(g) refund to the claimant for wrongful handling charges of RM649.04 (including 6% GST).

[3] In support of the plaintiff's application, the learned counsel cited the following grounds:

(a) denial of natural justice in that the plaintiff was not advised that they could be legally represented;

(b) the adjudication decision has not been enforced under s 28 of the CIPAA;

(c) non-disclosure of material facts in that the defendant had failed to disclose an oral agreement between them that they agreed to set off an outstanding amount of RM310,285.94 from the Batu Berendam Project as shown in the Revised Certificate No 9;

(d) there is a cross-claim against the defendant in that the defendant was also appointed to carry out similar job at Batu Berendam, Malacca where the defendant failed to construct the pit according to the approved design and subsequently abandoned the work. A third party had to be appointed to remedy and complete the job and the charges incurred would be imposed on the defendant;

(e) the plaintiff has filed the application to stay and set aside the adjudication decision; and

A (f) there are ongoing projects and the plaintiff will suffer irreparable damage and that the plaintiff is solvent.

[4] The learned counsel for the defendant in opposing the application pointed out that:

B (a) the averments in paras 3(c), 3(d) and 3(e) were matters deposed in the supplementary affidavit of the plaintiff and they should not concern me in considering this application. Those issues would be relevant for the setting aside and stay of the adjudication decision. Hence, they chose not C to reply;

(b) solvency of the plaintiff was irrelevant;

(c) the adjudication decision was binding upon the plaintiff unless a stay was granted or set aside;

D (d) the adjudication decision need not be enforced for the purposes of s 466 notice; and

(e) the presumption of being insolvent has been triggered against the plaintiff after the lapse of 21 days.

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[5] The matters referred to in paras 3(c), 3(d) and 3(e) are averments which are found in the application to stay and set aside the adjudication decision and they were brought in vide the supplementary affidavit of the plaintiff. The learned counsel for the defendant, as said above, chose not to reply. Granted F that those matters will be dealt with by the court hearing the petition — see *Dataran Rentas Sdn Bhd v BMC Constructions Sdn Bhd* [2008] 2 MLJ 856; [2007] 2 MLRA 449, however they are not questions or issues of law which may be rebutted by way of oral submission — see *Wong Sai Tack v Chien Hon Keong* [2000] 5 MLJ 74; [1999] 3 MLRH 716. They are matters of facts G which to my mind are relevant to this application and that they are before the court. The defendant should at the very least attempt to show that they do not amount to a disputed debt. Following *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 286; [1995] 1 MLRA 48 at p 50 where it was reiterated:

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> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted ...

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Therefore, the defendant is taken to admit these facts.

[6] In *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2014] 11 MLJ 916; [2013] 5 MLRH 299 there were two suits filed by the plaintiff in

two separate courts. In the first suit the plaintiff's being the subcontractor claimed against the defendant the main contractor. The claim was dismissed but the court allowed the defendant's counterclaim. In the second suit the plaintiff claimed for wrongful termination of its employment against the defendant and judgment was entered in plaintiff's favour where the plaintiff successfully applied to strike out the defence and counterclaim. Having obtained the judgment in the first suit, the defendant issued the notice under s 218 of the Companies Act 2016 to wind up the plaintiff. The High Court issued a Fortuna injunction sought for by the plaintiff on the ground that there was a valid and genuine cross-claim in that the findings in the second suit was affirmed by the Federal Court indirectly by dismissing the leave application.

In *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295 the dispute between the parties went before the arbitrator and the decision was in the defendant's favour. The plaintiff's application to set it aside was pending. Meanwhile the defendant issued a notice under s 218 of the Companies Act 2016 demanding for payment. This demand was not met and the defendant presented the petition. The plaintiff then filed for an injunction to prevent the defendant from proceeding with the winding up petition. The High Court dismissed the application and the plaintiff appealed. The Court of Appeal allowed the appeal and issued the injunction against the defendant. The court discussed the two branches of the principle in granting the Fortuna injunction when there is an abuse of process. In summary, the first branch was where the petition has no chance of success as a matter of law and will cause irreparable damage to the company and/or as a matter of fact when there is no supporting evidence. The second branch was where there is a suitable alternative remedy to a winding up petition although the petition has a chance of success because it will bring pressure to the company intended to be wound up. It was further held that the arbitration award must be converted into a judgment order or order of the court to render it as undisputed debt. As long as it is not registered the award is considered as disputed.

In *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 the appellant (insurer) was made liable for the judgment against the plaintiff. The appellant appealed and applied for a stay. The application for stay was dismissed and it went up to the Court of Appeal and the application was pending. The appellant refused to pay the plaintiff and was issued with a s 218(1)(e) of the Companies Act 2016 notice by the respondent's solicitors. This prompted the appellant to seek the anti-suit injunction was dismissed after the inter partes hearing. On appeal against the said decision the Court of Appeal held that once an award handed down by the court and where no stay was granted, the award was no longer considered as a disputed debt until it was set aside or stayed.

A [7] While it is correct that to present a petition there may not be any judgment against the non-paying party, however in *Mobikom* there was this arbitrator's award which has not been registered hence, the Court of Appeal held it to be non-binding. Likewise, here the adjudication decision has yet to be enforced under s 28 of the CIPAA and I would think the same should apply
B and hold that the adjudication decision is not binding more so when the defendant has admitted to the existence of the oral agreement pertaining to the setting-off and the cross-claim. In *Mobikom* the learned judge held at p 327 (MLJ); p 310 (CLJ):

C > [15] I entirely agree with the law as stated by the learned judge and his approach. I would apply it here. Here too the defendant has not registered the award. All it has is a cause of action at common law to enforce the award in the usual way by means of a civil suit. The application by the plaintiff to set aside the award constitutes, in my judgment, a bona fide dispute of the alleged debt. The present case, in my view, comes within the second branch of the Fortuna principle.

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[8] In the circumstance I issued the Fortuna injunction sought for by the plaintiff.

Application allowed.

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Reported by Izzat Fauzan

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